Supreme Court, U.S.
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No. 87-66

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

BRENDA BERKMAN, on behalf of herself and a class of all similarly situated women,
Petitioner,

-v.-

THE CITY OF NEW YORK; EDWARD I.KOCH, individually and as Mayor of the City of New York; NEW YORK CITY FIRE DEPARTMENT; AUGUSTUS BEEKMAN, individually and as Fire Commissioner of the City of New York; NEW YORK CITY DEPARTMENT OF PERSONNEL; MICHAEL NADEL, individually and as Director of Personnel of the City of New York; THOMAS ROCHE, individually and as former Director of Personnel of the City of New York; CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK,
Respondents,

-and-

UNIFORMED FIREFIGHTERS ASSOCIATION and FIREFIGHTER ELIGIBLES ASSOCIATION, LIST NO. 1162, INC.,
Intervenor-Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 21, 1987

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. In this Title VII action challenging as discriminatory a physical test for firefighter, did the Court of Appeals depart from the accepted and usual course of judicial procedures, or decide a federal question of law in conflict with a decision of this Court or another court of appeals, by accepting the district court's finding that stamina is important in fighting fires, and then observing that, in this case, the lack of a specific measure of stamina did not render respondents' physical test for the position of firefighter vulnerable to Title VII challenge?

2. Where no alternative employment tests with substantial evidence of validity and less adverse impact upon women were put into evidence, did the Court of Appeals err in upholding the validity of a competitive test for firefighter which,

although valid, was not perfectly representative of all aspects of the job and which was scored by use of narrower scoring bands than those in a valid alternative scoring system which had greater adverse impact upon women?

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COUNTER-STATEMENT OF THE CASE

Brenda Berkman, an unsuccessful applicant for the position of New York City firefighter, filed this Title VII class action in 1979, contending that the physical test portion of Examination 3040 for firefighter discriminated against women. She prevailed. In March of 1982, the United States District Court for the Eastern District of New York found that respondents had not demonstrated the validity of the physical test portion of Examination 3040. The Court ordered, inter alia, that the Fire Department hire as firefighters up to 45 interested and qualified class members, and that respondents, in consultation with petitioner, develop a new nondiscriminatory entry level physical test for firefighter. Specifically, the Court's March 25, 1982 order provided that defendants develop a physical test that did not discriminate against women in accordance

with the Uniform Guidelines on Employee Selection Proceedures and the American Psychological Association Standards for Education and Psychological Testing. E723-27[1]

A new test was developed. Over twenty-two days of hearings, beginning in 1983 and ending in 1985, respondents demonstrated the validity of the new physical test portion of Examination 1162 for firefighter.

On October 8, 1985, the District Court issued a decision in which it found that the new physical test comported with the requirements of the March, 1982, order with the exception of its scoring, which, according to the Court, purported to

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[1] References preceded by "A" are to the Appendix to the Petition. References preceded by "E" are to the Joint Appendix in the Court of Appeals.

distinguish between qualified candidates to a degree of exactness not consistent with the lack of precision inherent in the exam. Berkman v. City of New York, 626 F. Supp. 591, 593 (E.D.N.Y. 1985) ("Berkman III"); A57.

To remedy the deficiency it found in the scoring system, the District Court directed implementation of a three band scoring system for the physical test. This system, utilizing broader rating bands, had been recommended by petitioner's expert. A93; 626 F.Supp. at 600. Noting that the Guidelines required that alternative measures with equal validity but with less adverse impact on a protected group be explored and used where available, the District Court stated that use of the three-band rating system appeared required by defendants' own criterion measures as well as by the failure of defendants in their job analysis

and test preparation to give due consideration to the demand made on aerobic energy in performing firefighting tasks. A93-95; 626 F. Supp. at 600.

Following the October 8, 1985 decision, respondents presented evidence that use of the three band scoring system ordered by the District Court would have a greater adverse impact on women than the seven band system. Berkman v. City of New York, 812 F.2d 52, 57 (2d Cir. 1987) ("Berkman IV"); A23. Petitioner did not contradict this showing. A35; 812 F.2d at 60. Nevertheless, the District Court, in its February 17, 1986 order, directed implementation of the discriminatory three band scoring system. A103, 104.

Respondents appealed, and petitioner cross-appealed. Respondents contended, inter alia, that the District Court's finding that the three band scoring system had less

adverse impact on women than respondents' seven band system was clearly erroneous. The Court of Appeals agreed, and held that the three band remedy was plainly unwarranted. A37; 812 F.2d at 60.

Petitioner, without ever having proffered a valid alternative physical test with less adverse impact (other than the more discriminatory three band system which she erroneously believed to be less discriminatory), cross-appealed, contending that the District Court should have required a new physical and written test, or that the existing tests should only be used for random selection from among all candidates who received passing scores. A28; 812 F.2d at 58, 59. Respondents argued that the District Court, by directing implementation of a three band scoring system, which it had found to be validated by respondents' criterion study, had implicitly found that

some form of rank order - as opposed to random selection - was warranted. The Court of Appeals denied petitioner's cross-appeal, and upheld the District Court's conclusion that the written and physical tests of Exam 1162 were appropriate for use to select entry-level firefighters.[2] A35; 812 F.2d at 60.

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2 Pursuant to section 56 of the New York State Civil Service Law, the eligible list derived from the results of Examination 1162 will expire on or about July, 1988.

REASONS FOR DENYING THE WRIT

PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE DENIED. THE COURT OF APPEALS NEITHER DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS NOR DECIDED A FEDERAL QUESTION OF LAW IN CONFLICT WITH A DECISION OF THIS COURT OR OF ANOTHER FEDERAL COURT OF APPEALS.

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Petitioner first claims that the Court of Appeals departed from the accepted and usual course of judicial proceedings, from the mandate of Rule 52(a), from the scope of appellate review prescribed by the Court in Anderson v. City of Bessemer City, 470 U.S. 564 (1985), and from fundamental principles of Title VII by allegedly disregarding the District Court's finding concerning stamina or the use of aerobic energy in firefighting.

In fact, the Court of Appeals, in upholding the validation of respondents'

physical test for the entry-level position of firefighter, accepted the petitioner's position that "stamina, a function of a person's aerobic energy system, is important in the performance of a firefighter's tasks" A31, 32; 812 F.2d at 59, and did not set aside the District Court's finding that "firefighting is [not] entirely an aerobic activity, making no demands for the expenditure from time to time of anaerobic energy at maximal oxygen levels". A90; 626 F.Supp at 599. The Court of Appeals merely held that a physical test of the ability to perform simulated job tasks of firefighter without a specific measure of stamina does not lack validity to a degree that renders it vulnerable to Title VII challenge. A32; 812 F.2d at 59. The foregoing statement is consistent with this Court's decision in Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975), which states that a test need only be predictive of

or significantly correlated with important elements of work behavior relevant to the job for which the candidate is being tested. An employment test need not perfectly replicate a job.

The Court of Appeals did observe that firefighters frequently face situations where their anaerobic abilities determine whether or not they will save the lives of fire victims, noting that abundant evidence in the record confirmed that a firefighter arriving on the scene of a fire will frequently be obliged to use strength and speed in a short amount of time. A32; 812 F.2d at 59. While petitioner argues that this observation of the Court of Appeals conflicts with findings of the District Court that the physical test placed too great an emphasis on the anaerobic capacities of candidates with too little regard#...#for prudent, paced performance (A89, 90; 626 F. Supp. at 599), the Court

of Appeal's subsequent reference to the Tenth Circuit's 1972 holding in Spurlock v. United Airlines, Inc., 475 F. 2d 216, 219, (10th Cir. 1972) that an employer's burden to justify employment criteria is correspondingly lighter in a job where "human risks" are involved, confirms that the Court of Appeals was only providing support for its legal holding that, in this case, the lack of a specific measure of stamina in the physical test portion of Examination 1162 for firefighter, where saving lives is critical, did not render that test vulnerable to Title VII challenge.

In short, the Court of Appeals, far from departing from the accepted and usual course of judicial proceedings, determined the issues on appeal in a manner consistent with Albemarle and Spurlock. Moreover, the Court did not cite to, change or extend either Rule 52(a) or Anderson v. City of

Bessemer City. Finally, the remark of the Court as to the use of anaerobic abilities in firefighting in New York City does not depart in any way from the principles of Title VII.

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Petitioner argues that the Court of Appeals' approval of the physical test conflicts with principles of employment test validation because the test does not perfectly replicate the job of firefighting. However, in twenty-two days of trial extending over a two and one half year period during which the petitioner was given the use of Fire Department facilities to perform her own studies and job analyses, she never met her basic obligation as a plaintiff under Title VII: coming forward with a valid alternative physical test for firefighter which had less adverse impact upon women. Albemarle

Paper Co. v. Moody, 422 U.S. 405, 425 (1975). See also A93, 626 F. Supp. at 600.

Petitioner's sole proffer was a three band scoring system for respondents' job sample test, a scoring system which she ultimately conceded was more discriminatory than respondents' proposed seven band system. A35; 812 F2d at 60. Given petitioner's focus on achieving the hiring of more women firefighters, and her zeal in the prosecution of this case over an eight year period, it must be assumed that if there had existed a less discriminatory physical test which could be administered in a feasible manner to over 20,000 candidates within a reasonable period of time, petitioner would have found it, and submitted it to respondents and the Court. She did not produce any such test, and no statement of this Court as to either the exactitude of representativeness of a job sample test or

the range of scoring bands necessary for a valid test under the Guidelines will enable her to find a more valid test with less adverse impact if none exists.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

August 21, 1987

Respectfully submitted,

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